to determine if the intrusion was reasonable." *Illinois v. McArthur*, 531 U.S. 326, 331 (2001). A defendant's status as a parolee subject to a search condition "informs both sides of that balance." *Knights*, 534 U.S. at 119.

It is beyond dispute that a parolee has a significantly reduced expectation of privacy. *See Morrissey v. Brewer*, 408 U.S. 471, 478 (1972) (describing the conditions of parole imposed on parolees throughout the nation). It is difficult to conceive of a person other than a prison inmate whose reasonable or actual expectation of privacy is less than that of a parolee. *See Hudson v. Palmer*, 468 U.S. 517 (1984). Indeed, although at liberty, in California "[p]risoners on parole shall remain under the legal custody of the [California Department of Corrections and Rehabilitation]." Cal. Penal Code § 3056. Among other conditions, the parolee's person, his or her residence, and any property under his or her control "may be searched without a warrant at any time by any agent of the Department of Corrections or any law enforcement officer." Cal. Code Regs. Tit. 15, § 2511(b)(4). This search condition is not merely a requirement of the Department of Corrections and Rehabilitation; it is imposed by the People of California, acting through their elected state legislature. *See* Cal. Penal Code § 3067(a).[3] Consequently, it is irrefutable that petitioner, like all parolees who accept this condition, "had no subjective expectation of privacy whatsoever." *United States v. Crawford*, 372 F.3d 1048, 1065 (9th Cir. 2004) (Trott, J., concurring); *see Knights*, 534 U.S. at 119-20. For this reason alone, the deputy's conduct herein was reasonable within the meaning of the Fourth Amendment. *See Smith v. Maryland*, 442 U.S. 735, 742-43 (1979).

Nevertheless, the discretion of the searching officer is not untrammeled. Rather, it is circumscribed by the state law requirement, found in decisional law and statute, that the search not be arbitrary, capricious or conducted for the purpose of harassment. *See Reyes*, 19 Cal. 4th at 753-54, 968 P.2d at 451, 80 Cal. Rptr. 2d at

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3. California Penal Code section 3067(a) provides: "Any inmate who is eligible for release on parole pursuant to this chapter shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of day or night, with or without a search warrant and with or without cause."

740. For example, state law protects a parolee from searches that are needlessly repetitive, made at an unreasonable hour, conducted in a humiliating manner, or under other oppressive circumstances. *People v. Clower*, 16 Cal. App. 4th 1737, 1741, 21 Cal. Rptr. 2d 38 (1993). This circumscription further protects a person with the greatly reduced expectation of privacy possessed by a parolee. In this case, petitioner did not challenge the scope or intensity of the search in state court. And he cannot validly claim that the scope or intensity of the search was unreasonable in relation to the purpose of the search. (*See* Statement of the Case, *ante*.)

In turn, the parole search serves a compelling, if not overwhelming, need. The California Legislature has determined the "supervision and surveillance of parolees" is necessary to promote "the interest of public safety for the state[.]" Cal. Penal Code § 3000(a)(1). This Court has similarly concluded that the state interest in the successful management of the parole system to ensure compliance with parole conditions is "overwhelming." *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365 (1998). This Court has approved "close parole supervision" because "parolees are more likely to commit future criminal offenses than are average citizens." *Id.* at 365; *see Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987); *see also Ewing v. California*, 538 U.S. 11, 26 (2003) (statistics on recidivism in California); *Crawford*, 372 F.3d at 1069 (statistics on recidivism of California parolees).

Certainly, the California parole search condition serves the state's interest in the supervision of its parolees. This Court has recognized that "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential." *United States v. Biswell*, 406 U.S. 311, 316 (1972). Of course, under a regime of reasonable suspicion, searches can be only as frequent as the discovery of the requisite quantum of suspicion permits. The requirement of individualized suspicion, as the California Legislature concluded, would frustrate the need for effective supervision of parolees. Careful concealment of illegal activities would allow these activities to go "undetected and uncorrected." *Griffin*, 483 U.S. at 878.

The balance of competing interests—the parolee's greatly diminished expectation of privacy and the State's need to supervise a person who was, and likely remains, a threat to society—justifies California's rule permitting suspicionless searches of parolees'

persons and effects. A requirement of reasonable suspicion urged by petitioner would strike an inappropriate balance of the competing interests.

Nonconsensual street encounters between police and citizens are generally governed by the reasonable suspicion standard announced in *Terry v. Ohio*, 392 U.S. 1 (1968). Thus, reasonable suspicion that a person is about to commit a crime justifies his detention; reasonable suspicion that he or she has a weapon justifies his or her search. Under petitioner's view of the law, a parolee would receive virtually as much protection from the Fourth Amendment as a citizen who was not on parole. The only difference would be the circumstance in which the officer had reasonable suspicion to believe that the person under investigation possessed incriminating evidence other than a weapon. In that situation, the nonparolee could not be searched, *Minnesota v. Dickerson*, 508 U.S. 366 (1993), but the parolee properly could be searched. Such a *de minimis* difference is wholly inadequate to serve the compelling state interest in the supervision of parolees.

As the Court has noted in discussing the compelling state need for effective probation supervision, the goals of rehabilitation and protection of the community (both of which are typically identified as the objectives of probation and parole) "require and justify the exercise of supervision to assure that the [probation or parole] restrictions are in fact observed. Recent research suggests that more intensive supervision can reduce recidivism[.]" *Griffin*, 483 U.S. at 875. By contrast, petitioner's position would result in less, not more, supervision. The prohibition of searches based on an uncorroborated tip is only one example. Thus, the requirement of reasonable suspicion would "completely undermine the purpose of the search condition." *Owens v. Kelley*, 681 F.2d 1362, 1368 (11th Cir. 1982).

This balance of competing interests confirms the wisdom of *Reyes*, 19 Cal. 4th at 753, 968 P.2d at 451, 80 Cal. Rptr. 2d at 740:

> The level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search is on notice that his activities are being routinely and closely monitored. Moreover, the purpose of the search condition is to deter the commission of crimes and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches. We thus conclude a parole search may be reasonable despite the absence of particularized suspicion.

In sum, a parolee's severely diminished expectation of privacy, adequately protected by the state law prohibition against harassing searches, must yield to the overwhelming governmental need to supervise over 130,000 parolees in California. *See United States v. Kincade*, 379 F.3d 813, 835 (9th Cir. 2004) (en banc) (sustaining suspicionless searches of conditional releasees and their property, as long as "such searches meet the Fourth Amendment touchstone of reasonableness as gauged by the totality of the circumstances").

B. The California Parole Search Condition Is Justified By This Court's "Special Needs" Jurisprudence

This Court's jurisprudence has validated the supervision of probationers and parolees as a "special need" that can justify a suspicionless search. For example, in *Griffin*, this Court held that a state's operation of a probation system "presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements." 483 U.S. at 873-74. Although *Griffin* involved probation, its reasoning and concerns apply "with equal, if not greater, force, to the parole system." *People v. McCullough*, 6 P.3d 774, 779 n.10 (Colo. 2000); *see also Kincade*, 379 F.3d at 825. Because parolees "are more likely to commit future criminal offenses than are average citizens," *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. at 365, this Court recognizes that a state can "accord[] a limited degree of freedom in return for the parolee's assurance that he will comply with the often strict terms and conditions of his release. In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements. The State thus has an 'overwhelming interest' in ensuring that a parolee complies with those requirements and is returned to prison if he fails to do so." *Id.* Given that "parole may be an even more severe restriction on liberty because the parolee has already been adjudged in need of incarceration[,] . . . the 'special needs' of probation discussed in *Griffin* would appear to be heightened for parole." *McCullough*, 6 P.3d at 779 n.10; *see also Kincade*, 379 F.3d at 833-35; *Crawford*, 372 F.3d at 1077 (Trott, J., concurring).

That evidence obtained during a parole search may be used in a criminal prosecution does not defeat respondent's position. Under the relevant test, the "special needs" doctrine could not justify a "program whose primary purpose was to detect evidence of ordinary

criminal wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 38 (2000). In California, although a parole search may serve a law enforcement purpose, the programmatic objective is to supervise parolees by uncovering evidence that reveals whether the parolee is complying with, or violating, the conditions of parole. Not all such evidence constitutes proof of criminal activity. In fact, any evidence may be used for the purpose of an administrative revocation of parole. *See People v. Willis*, 28 Cal. 4th 22, 39, 46 P.3d 898, 909, 120 Cal. Rptr. 2d 105, 118 (2002). Therefore, California's parole search condition falls squarely within the parameters of this Court's "special needs" search jurisprudence. *Griffin*, 483 U.S. at 873-74.

Moreover, the authorization of police officers to conduct parole searches does not alter the "special needs" nature of the search. *See New York v. Burger*, 482 U.S. 691, 717-18 (1987). California invests parole officers and "other peace officer[s]" with the authority to conduct parole searches. Cal. Penal Code § 3067(a). This empowerment rationally serves the California parolee supervision program. Indeed, it is doubtful the program could function without the participation of police officers. As stated earlier, more than 130,000 parolees—equivalent to the population of a city—are on release in California at any given time. It is unrealistic to expect parole officers to surveil the streets twenty-four hours a day in search of parolees who may violate the conditions of their paroles. Given the number and potential mobility of parolees, the statute wisely deploys all available personnel in the supervision of those parolees.

That this necessary use of law enforcement officers is permissible under the Fourth Amendment is illustrated by *Griffin*, 483 U.S. 868. In *Griffin*, police initiated contact with the probation office, encouraged the probation officers to conduct the search, were present during the search, processed the evidence and used it in the probationer's criminal prosecution. This active participation did not invalidate the application of the "special needs" doctrine for reasons equally applicable to this case: the reduced expectation of privacy of parolees and the overwhelming need to supervise their activities closely.

In sum, the search of a parolee by a parole agent or any law enforcement officer to supervise that parolee is a "special needs" search within the meaning of this Court's Fourth Amendment jurisprudence. In turn, to determine the reasonableness of the search, this Court must consider the nature of the privacy interest affected by

the search, the character of the intrusion, the nature and immediacy of the State's concerns, and the efficacy of the means for meeting them. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 830-38 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654-65 (1995). As previously explained in Section A of Argument II, *ante*, a parolee has a significantly diminished expectation of privacy, especially when the parolee has been expressly informed that he or she may be searched by a parole agent or a law enforcement officer at any time with or without cause. In contrast, the state has an overwhelming need to supervise parolees, and a suspicionless search condition is more efficacious than one requiring reasonable suspicion. Consequently, a suspicionless parole search in a public place does not violate the Fourth Amendment.

C. Petitioner Validly Consented To The Parole Search Condition

The issue of consent is properly before this Court. This Court may consider "the questions set out in the petition, or fairly included therein[.]" Sup. Ct. R. 14.1(a). Petitioner has challenged the constitutionality of a California's parole search condition, which permits suspicionless searches. The suspicionless search of a citizen, even a nonparolee, is valid if conducted pursuant to that person's consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Consequently, this Court may determine whether petitioner consented and, if so, whether that consent validated the search.

Although the Fourth Amendment generally requires that a search be authorized by a judicial warrant based upon probable cause, it is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth*, 412 U.S. at 219; *accord Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *Washington v. Chrisman*, 455 U.S. 1, 9-10 (1982). That principle is consistent with the general rule, articulated "in the context of a broad array of constitutional and statutory provisions," that "presumes the availability of waiver." *New York v. Hill*, 528 U.S. 110, 114 (2000) (internal quotation marks omitted); *see also United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) ("A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution"); *Peretz v. United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal

defendants are . . . subject to waiver"). Consent must be voluntary to be constitutionally valid, *Schneckloth*, 412 U.S. at 222; *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968), but an individual's consent to search may be deemed voluntary, for Fourth Amendment purposes, even if it is motivated by the subject's belief that refusal to consent will result in concrete disadvantages. For example, a consent search cannot be found involuntary simply because an individual consents out of a desire to avoid a greater intrusion. *See Schneckloth*, 412 U.S. at 228.

This Court's decision in *Zap v. United States*, 328 U.S. 624 (1946), reflects the view that an individual's consent to search may be deemed voluntary even when that consent is a required condition for receipt of a valuable government benefit. The petitioner in *Zap* "entered into contracts with the Navy Department under which he was to do experimental work on airplane wings and to conduct test flights." *Id.* at 626. Pursuant to statutory requirement, *id.*, the contract between the parties stated that "[t]he accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government." *Id.* at 627. Government agents subsequently inspected petitioner's business books and records over his objection. *Id.* This Court held that the search was lawful, explaining that "when petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." *Id.* at 628.

Zap further establishes the proposition—central to this case—that a consent to search may be granted in advance, and without specific restrictions. The defendant in *Zap* did not give consent at the time the search was conducted; to the contrary, he attempted (unsuccessfully) to prevent the search from occurring. 328 U.S. at 627. The Court nevertheless found that the defendant was bound by his prior contractual commitment to permit inspection of his books and records. *Zap* makes clear that an individual may give valid and binding prospective consent to a category of searches to be performed at unspecified times in the future.[4]

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4. The judgment in *Zap* was subsequently vacated on other

Under California law, a parolee can reject parole by refusing to agree to the search condition. *See* Cal. Penal Code § 3067(b); *see also* Cal. Penal Code § 3060.5; *Willis*, 28 Cal. 4th at 39, 46 P.3d at 908-09, 120 Cal. Rptr. 2d at 118. If the inmate has been granted parole, he or she has necessarily agreed to the condition; if he has not accepted the condition, he is not a parolee. In 2000, when petitioner complied with section 3067(a) and was granted parole, he had a choice. He could have refused to comply with that provision, in which event he would not have been released. Petitioner's acceptance of the search condition constitutes consent within the meaning of this Court's consent jurisprudence.

Petitioner's consent to search given as a condition of release is not rendered involuntary by the fact that the alternative is continued incarceration. First, it is well known that criminal defendants can and often do enter pleas of guilty (with or without plea agreements) that they know will result in substantial periods of incarceration, generally because they regard their alternatives as even more unattractive. This Court has repeatedly recognized that a guilty plea is not rendered involuntary simply because it is motivated by a desire to avoid greater punishment. *See Corbitt v. New Jersey*, 439 U.S. 212, 218-23 (1978); *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Brady v. United States*, 397 U.S. 742, 755 (1970). Second, the government cannot be said to coerce an individual simply by presenting him with a choice in which one of the alternatives is plainly more attractive than the other. No one would suggest, for example, that a defendant's guilty plea is involuntary if the government offers him a particularly favorable plea agreement. In short, no legal principle supports the view that an individual's waiver of constitutional rights is rendered unenforceable whenever the benefits of that waiver substantially outweigh its costs.

California parolees in general, and petitioner in particular, are given a meaningful choice: conditional liberty with reduced Fourth

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grounds. *See Zap v. United States*, 330 U.S. 800 (1947). This Court has continued to treat *Zap* as good law, however, and has cited it as authority for the proposition that a search based on consent is lawful notwithstanding the absence of a judicial warrant and/or probable cause. *See Schneckloth*, 412 U.S. at 219; *Katz v. United States*, 389 U.S. 347, 358 n.22 (1967); *Texas v. Brown*, 460 U.S. 730, 736 (1983) (plurality opinion).

Amendment protection or continued incarceration with no expectation of privacy. *Hudson*, 468 U.S. 517. "Nothing is more common than an individual's consenting to a search that would otherwise violate the Fourth Amendment, thinking that he will be better off than he would be standing on his rights." *United States v. Barnett*, 415 F.3d 690, 692 (7th Cir. 2005). Confronted with the alternative of continued incarceration, petitioner "gave up nothing." *Id.*

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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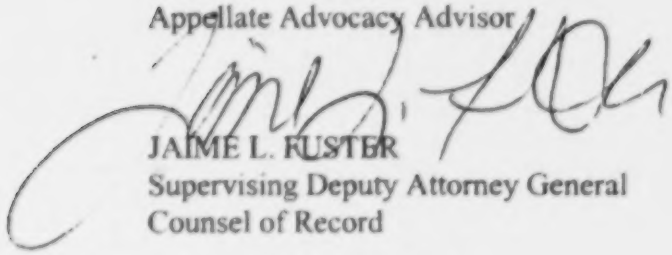

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